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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J.W. BIRSNER, M.D.,
RADIOLOGY NUCLEAR MEDICAL GROUP,
a Professional corporation,
Petitioners,

vs.

K. SIVALIGNHAM, M.D.; S.K. SUNDER, M.D.;
LANCASTER CARDIOLOGY MEDICAL GROUP, INC.,
a Professional corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION ONE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND

SUMMARY OF ARGUMENT

In their Petition for Writ of Certiorari, Petitioners J.W. Birsner, M.D. and Radiology Nuclear Medical Group ("Birsner" or "Petitioners") seek reversal of the Court of Appeal's decision and remand of the matter to the trial court. Birsner's Petition is made pursuant to Supreme Court Rule 10(c) on the ground that the Court of Appeal's decision is in direct conflict with the applicable decisions of this Court.

As set forth below, a review of the Court of Appeal's decision in this case requires denial of Petitioners' Writ of Certiorari. The Court of Appeal's decision is in accordance with the recent United States Supreme Court's decision in Milkovich, as well as

California case law which protects statements of opinion under both the United States and California constitutions.

Therefore, Respondents K. Sivalingham, M.D., S.K. Sunder, M.D., and Lancaster Cardiology Medical Group ("Respondents") submit that there is no basis for the Supreme Court's review of this matter under Supreme Court Rule 10(c).

THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

A. Subjective Assertions or Opinions Involving A Public Concern Remain Protected Under the United States Constitution

Petitioners assert that the Court of

Appeal's decision in this matter conflicts with the United States Supreme Court's decision in Milkovich v. Lorain Journal Co. (1990) ____U.S.____, 110 S.Ct. 2695. Respondents submit that this contention is based on a tunnel-vision reading of Milkovich and further ignores the totality of the facts as alleged in Petitioners' second amended complaint.

In Milkovich, this Court specifically drew a distinction between "subjective assertions" and "an articulation of an objectively verifiable event," noting that the connotation that Milkovich committed perjury "is sufficiently factual to be susceptible of being proved true or false." 110 S.Ct. at 2908.

Unlike a statement suggesting perjury, the statement in the Lancaster Cardiology letter that "the quality of

the thallium studies done at Antelope Valley Hospital was substandard" is not objectively verifiable, as the terms "quality" and "substandard" are capable of a number of differing interpretations. Without reference in the letter to, for example, a "quality control" test for thallium studies, the use of the words "quality" and "substandard" are no more than a subjective assertion, based on Lancaster Cardiology's own definitions of those terms.

In addition, the Milkovich court reaffirmed its support for protection of statements of opinion involving a private figure on a matter of public concern. This Court stated:

> Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding

public figures or official, those individuals must show that such statement were made with knowledge of their falsity or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by Gertz.

110 S.Ct. at 2908 (emphasis added).

The fact that the statements here involve a matter of public concern was considered by the trial court below. As noted in the Court of Appeal's decision, the trial court stated:

[E]specially in light of medical treatment to make this type of a statement which an opinion subject

> to the laws of libel and slander would create, to use again the word[s] of the upper courts, a chilling effect where we wanted to have as much free expression regarding medical treatment of individuals. And this would cause persons to be reticent in giving second opinions if a statement like this was determined to be libel or slander . . .

Petition, App.6.

B. The Totality of Circumstances Supports The Court of Appeal's Determination That the Alleged Defamatory Statement Was An Expression of Opinion

Respondents submit that the Milkovich decision does not mandate review of an alleged defamatory statement in a vacuum. Rather, as pointed out by the

Court of Appeal, "a reviewing court must make an independent examination of the whole record to ensure that there is no infringement of free expression." Petition, App.13, citing Mover v. Amador Valley J. Union High School District (1990) 225 Cal.App.3d 720, 724.

The Court of Appeal conducted its own independent examination of the letter which contains the allegedly defamatory statement. As noted by the Court, in full text the first paragraph states:

> Dr. Sunder informed me per his conversation with Dr. Kumar, that the quality of the thallium studies done at Antelope Valley Hospital was substandard. this is not the first time such a claim has been made, and I wanted to bring this matter to your attention.

Petition, App.14.

Therefore, the letter on its face makes clear that this statement is not a fact, but merely "a claim" which Dr. Sivalingham of Lancaster Cardiology wanted to bring to the attention of another physician. The Court of Appeal, relying on Dong v. Board of Trustees (1987) 191 Cal.App.3d 1572, 1587, stated that phrases such as "I claim that" and "I consider that" are plainly expressions of opinion.
Petition, App.14.

In his second letter, Dr. Sivalingham stated he had not reviewed a sufficient number of cases done in Antelope Valley Hospital to make "this claim." This letter further clarifies that Dr. Sivalingham was making a subjective statement, rather than a statement of fact objectively verifiable.

Under the "totality of circumstances" test, it is a question of law whether a statement is characterized as opinion or fact. Baker v. Los Angeles Herald Examiner (1986) 42 Cal.3d 254, 260; Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596, 601. The Court of Appeal considered the facts alleged in the second amended complaint filed by Birsner and concluded that the alleged defamatory statement was protected speech under the First Amendment, the Milkovich decision and California law.

CONCLUSION

For the foregoing reasons, Respondents K. Sivalingham, M.D., S.K. Sunder, M.D. and Lancaster Cardiology Medical Group, Inc. respectfully request that this Court deny Petitioners' Writ of Certiorari in this matter. The Court

of Appeal's decision is in harmony with the Milkovich decision and case law in California, both of which continue to provide first amendment protection for free expression and recognize that an alleged defamatory statement must be examined under the totality of the circumstances.

Dated: March 20,1992

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